

STATE OF MICHIGAN
COURT OF APPEALS

MAHIE SKAFF,

Plaintiff-Appellant,

v

ROCKY PRODUCE, INC., and ROCKY
INVESTMENTS CO.,

Defendant-Appellee.

UNPUBLISHED
December 5, 2006

No. 268077
Wayne Circuit Court
LC No. 05-507949-CK

Before: Jansen, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendants in this premises liability action. We affirm.

Plaintiff's granddaughter was a tenant of property leased by defendants. Plaintiff visited her granddaughter's loft for the first time. She stepped up onto a platform (a step), turned around a pillar, and then fell off the platform. When asked why she did not step back down off the platform, plaintiff explained, "Because the floor, it was all looking alike and it was so shiny, so – this is my first time there. ... I took it for granted that it was just the same, all of it." The granddaughter's fiancé, Rodney Fakhoury, submitted an affidavit wherein he indicated that the premises were leased by his fiancée for "residential purposes on a month-to-month basis." He also alleged that several other tenants leased the premises for residential purposes.¹

Plaintiff first argues that the trial court erred in granting summary disposition to defendants because defendants had exclusive possession and control of the premises. We disagree.

¹ An affidavit must be based on personal knowledge and state with particularity facts that would be admissible as evidence to establish the grounds stated in the motion. MCR 2.119(B). The affidavit fails to indicate that it is based on personal knowledge, but seemingly contains hearsay where the lease was purportedly entered into by Fakhoury's fiancé.

Appellate review of a summary disposition decision is de novo. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004). Imposing liability under a premises liability theory requires a showing that the defendant had both possession and control of the premises. *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980). The person in possession is in control, and therefore normally best able to prevent harm. *Id.* A plaintiff must therefore show that the defendant possessed the premises at the time of the injury. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 702; 644 NW2d 779 (2002). A possessor is a person in occupation of the premises with intent to control it. *Id.* (citations omitted). “Possession” denotes the right under which one may exercise control over something to the exclusion of all others. *Id.* at 703 (internal quotation marks and citation omitted). “Control” means exercising restraint or direction. *Id.* An essential trait of the landlord-tenant relationship is that the tenant has exclusive possession and control. *Ann Arbor Union v YMCA*, 229 Mich App 431, 443; 581 NW2d 794 (1998).

Here, the injury occurred not in a common area of the building but in a private area, i.e., within rental unit 2C. Defendants had no right, under the verbal lease, to occupy unit 2C because it was leased to plaintiff’s granddaughter, albeit without a written lease. There is no evidence that defendants, when they rented unit 2C, reserved a right to occupy or enter the unit. Thus, defendants had neither possession nor control of the unit.

Further, possession does not turn on theoretical rights of possession but on actual exercise of dominion and control. *Derbabian, supra* at 704. Here, there is no evidence that defendants exercised *actual* possession or control of unit 2C; therefore, plaintiff cannot impose liability on defendants for an injury allegedly caused by a condition therein. *Id.* at 702-706. The trial court correctly concluded that the evidence failed to raise a genuine issue of material fact that defendants lacked possession or control of unit 2C.

Finally, plaintiff argues on appeal that she is entitled to relief in this matter because defendant violated the statutory duty owed by landlords to tenants, MCL 554.139, and because defendant violated certain Detroit city code provisions by leasing the premises without a valid certificate of occupancy. However, review of the complaint, the first amended complaint, and the second amended complaint reveals that plaintiff pleaded a common law claim of negligence and did not allege a claim based on any statutory or code violation. Rather, plaintiff raised these arguments in response to defendants’ motion for summary disposition and did not move to amend her complaint to raise these claims. Thus, the trial court did not address these issues. If these matters had been properly raised before and decided by the trial court, we might be inclined to consider their merits. *ISB Sales Co v Dave’s Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003). However, because these issues were not properly preserved for appellate review, we decline to address them further. *Id.*

Affirmed.

/s/ Kathleen Jansen
/s/ William B. Murphy
/s/ Karen M. Fort Hood